No. 97-1011

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1997

JERROLD ZIMAN and ELLEN ZIMAN,

Petitioners,

- v -

THE STATE OF NEW YORK and the NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

and

JERROLD ZIMAN and ELLEN ZIMAN,

Petitioners,

- v -

THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTION PRESENTED

Whether this case, in which petitioners succeeded over a seven year period in evicting tenants from their rent-controlled property, then had their subsequent takings claim dismissed, *inter alia*, for failure to file in a timely fashion under state law, presents a satisfactory context in which to determine whether a use limitation upon landlords property may constitute a compensable taking under the Fifth and Fourteenth Amendments or a denial of due process.

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities iii

Opinions Below 2

Jurisdiction 2

Statement of the Case 2

ARGUMENT

POINT I

Inasmuch as the dismissal of petitioners' takings claim was based upon an interpretation of a state statute of limitations and does not raise a federal constitutional issue, this Court should deny certiorari. 9

POINT II

As petitioners have set forth neither a viable claim of a regulatory taking of their property, nor a plausible claim that they were "compelled" to serve as landlords, this Court should deny certiorari 11

Conclusion 14

TABLE OF AUTHORITIES

Cases **Page**

Agins v. City of Tiburon, 447 U.S. 255 (1980) 11

Charbonneau v. State of New York, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992) 9

Goldblatt v. Hempstead, 369U.S.590 (1962) 11

Herb v. Pitcairn, 324 U.S. 117 (1945) 8, 9

Kennedy v. City of Seattle, 94 Wash. 2d 376, 617 P.2d 713 (1980) 13

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 8, 11, 12

NAACP v. Alabama, 357 U.S. 449 (1958) 10

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 11

Polednak v. Rent Control Board of Cambridge, 397 Mass. 854, 494 N.E.2d 1025 (1986) 12

Ziman v. New York State Division of Housing and Community Renewal, No. 93-113700 (Sup. Ct. New York County, Apr. 13, 1995), *affirmed*, 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept.), *leave to appeal denied*, 90 N.Y.2d 808, 664 N.Y.S.2d 270 (1997) 2, 3, 4, 5, 6

Ziman v. New York State Division of Housing and Community Renewal, 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), *affirmed* 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990) 2, 3, 4, 5

Ziman v. The State of New York, No. 92736 (Ct. of Claims, May 3, 1996), *affirmed*, 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept.), *leave to appeal denied*, 90 N.Y.2d 808, 664 N.Y.S.2d 270 (1997) 2, 6

United States Constitution:

Fifth Amendment i

Fourteenth Amendment i

Federal Statutes:

28 U.S.C. § 1257 2

New York Statutes:

Civil Practice Law and Rules
§ 205(a) 6, 7, 9

Court of Claims Act
§ 10(1) 4, 6

Laws of 1983, Chapter 403 3

Laws of 1984, Chapter 234 (Twenty Year Law) 3

Real Property Actions and Proceedings Law
§ 753 ..... 4, 5

New York Regulations

9 NYCRR
2204.4 4
2204.4(b)(1)(i) 4, 5
2204.4(g) 3
2204.5 3
2204.9 ..... 3, 4

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JERROLD ZIMAN and ELLEN ZIMAN,

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- v -

THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the
New York State Court of Appeals

Brief in Opposition for Respondents State of New York and the New York State Division of Housing and Community Renewal

Opinions Below

The decisions of the New York State Supreme Court in *Ziman v. New York State Division of Housing and Community Renewal* (Pet. App. 13a),[1] and the New York State Court of Claims in *Ziman v. The State of New York* (Pet. App. 6a) are unreported. The New York State Appellate Division, First Department consolidated the appeals of the two lower court decisions and affirmed them in an opinion (Pet. App. 4a) reported at 235 A.D.2d 369, 653 N.Y.S.2d 17 (1st Dept. 1997). Petitioners' motions for leave to appeal to the New York State Court of Appeals were denied (Pet. App. 1a, 2a) at 90 N.Y.2d 808 (1997).

Jurisdiction

The orders of the New York State Court of Appeals denying petitioners' motions for leave were entered on September 18, 1997. The petition for a writ of certiorari was filed on December 17, 1997, and docketed on December 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

Statement of the Case

Petitioners Jerrold and Ellen Ziman purchased a New York City townhouse in February 1984. At the time of purchase, the structure was divided into seven apartments, only several of which were occupied. In March 1984, desiring to obtain sole possession of the building for their personal use and occupancy, petitioners applied to respondent New York State Division of Housing and Community Renewal (DHCR) for certificates to evict three rent-controlled tenants pursuant to state law.

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[1] "Pet. App." refers to the appendix to the petition in No. 97-1011.

9 NYCRR 2204.5; *see generally* L. 1983, ch. 403 (R 63).[2] In July 1984, the New York State Legislature enacted a statute which, *inter alia*, constrained DHCR from issuing eviction certificates for tenants who had resided in rent-controlled apartments for more than twenty years. L. 1984, ch. 234 ("the Twenty Year Law") (Pet. App. 22a). Two of petitioners' tenants came within the reach of the Twenty Year Law (R 55).

In August 1984, petitioners filed hardship applications with DHCR, pursuant to state regulatory provisions which authorized the agency to issue eviction certificates in cases where a landlord cannot earn an annual 8-1/2% return on the assessed value of her property. 9 NYCRR 2204.4(g), 2204.9 (R 90). In the course of a lengthy evaluation of these applications, closely contested by petitioners' tenants, DHCR conducted financial audits of petitioners in April 1985 (R 101) and October 1985 (R 104), and held two adversarial fact finding sessions in June 1986. In June 1986, concluding that the hardship provisions of the NYCRR were superseded by the Twenty Year Law, a DHCR administrative law judge issued a determination denying the applications (R159); that determination was upheld on administrative appeal (R 8).

In April 1987, asserting that DHCR's determination denied them due process of law and constituted a taking of their property without just compensation, petitioners commenced a proceeding challenging the denial of their hardship applications. Supreme Court, New York County, dismissed the proceeding in August 1988, finding that the DHCR determination was constitutional. On appeal, the Appellate Division, First Department reversed. *Ziman v. New York State Division of Housing*

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[2]Numbers in parentheses preceded by the prefix "R" refer to page numbers in the Record On Appeal before the Appellate Division, First Department.

and Community Renewal, 153 A.D.2d 489, 544 N.Y.S.2d 147 (1st Dept. 1989), *affirmed* 76 N.Y.2d 721, 557 N.Y.S.2d 876 (1990) (*Ziman I*). Noting that petitioners had established undue hardship under 9 NYCRR 2204.9 and 2204.4, the Appellate Division deemed DHCR's denial of eviction certificates arbitrary and capricious (153 A.D.2d at 491, 544 N.Y.S.2d at 149). Consequently, the Appellate Division remitted the proceeding to DHCR with the directive that it issue certificates of eviction based on hardship. The Court of Appeals affirmed the First Department's decision in May 1990 and, complying with judicial order, DHCR issued eviction certificates in October 1990.[3]

On December 31, 1990, petitioners filed a notice of intention to file a claim before the New York Court of Claims, alleging that DHCR violated their constitutional and civil rights by preventing them from evicting their tenants from 1984 to October 5, 1990, and delaying the issuance of eviction certificates from May 31, 1990 to October 5, 1990 (R 146). Petitioners failed to file their claim within three years of the date of its accrual, as required by Court of Claims Act § 10(1).

Following the expiration of a three-month statutory waiting period (9 NYCRR 2204.4[b][1][i]), petitioners commenced summary holdover proceedings in January 1991 and obtained judgments of possession and warrants of eviction in July 1991. Following the expiration of a six-month judicial stay of execution (Real Property Actions and Proceedings Law [RPAPL] § 753), the last tenant was evicted from the premises on January 2, 1992 (R 57).

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[3]These decisions are not before the Court for review.

On May 27, 1993, petitioners commenced an action against DHCR and New York State in Supreme Court, New York County, alleging that they had suffered a taking of property without just compensation or due process under the State and Federal Constitutions by virtue of the Twenty Year Law, DHCR's purported "illegal delay" in issuing the certificates of eviction while the matter was in litigation, the three-month waiting period under 9 NYCRR 2204.4(b)(1)(i), and the six-month judicial stay of eviction granted pursuant to RPAPL § 753 (R 40-41). Petitioners sought $2,000,000 for the alleged due process violations and $250,000 for the alleged takings (R 42-43).

In *Ziman v. Division of Housing and Community Renewal*, Supreme Court denied petitioners' motion for partial summary judgment, granted in part defendants' cross-motion for summary judgment by dismissing the takings claim, and declared that the challenged statutes did not violate petitioners' due process rights (Pet. App. 13a). In dismissing the takings claim for lack of subject matter jurisdiction, the court noted that retroactive monetary damages sought under that claim could be awarded only by the New York Court of Claims (Pet. App. 19a). In dismissing petitioners' due process claim, the court held that the Twenty Year Law neither deprived petitioners of the power to evict tenants on various grounds, nor created perpetual tenancies, nor deprived the plaintiffs of the opportunity to litigate their right to the property. Since the regulatory framework was rationally related to a valid public purpose -- preserving affordable housing and preventing the dislocation of lower income and moderate income tenants -- and the delays in eviction were occasioned by the rights of various parties to pursue their legal remedies, the court held that petitioners had not been denied due process (Pet. App. 19a-20a).

On October 19, 1995, petitioners filed a claim for $250,000 with the Court of Claims, alleging that, by virtue of New York's statutes and regulations and DHCR's actions, they had suffered a temporary regulatory taking of property without just compensation. In *Ziman v. The State of New York*, petitioners moved for partial summary judgment and the State cross-moved for an order dismissing the claim on grounds that, having not initially been filed within three years of the claim's accrual (Court of Claims Act § 10[1]), it was untimely (Pet. App. 6a). Opposing this cross-motion, petitioners contended that the claim had been filed within six months of the dismissal of the Supreme Court action, and was consequently timely pursuant to the tolling provisions of § 205(a) of New York Civil Practice Law and Rules (CPLR).[4]

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[4] CPLR § 205(a) provides in part:

> New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff * * * may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action.

On May 3, 1996, the Court of Claims issued an order granting the State's cross-motion and dismissing the claim (Pet. App. 12a). Accepting *arguendo* petitioners' contention that the claim accrued on January 2, 1992, the date the last tenant vacated the premises, the court concluded that CPLR § 205(a) did not preserve claims before the Court of Claims which had not been timely commenced before it (Pet. App. 11a). In addition, the Court of Claims noted that the claim, largely directed against the State for actions of officers adjudging legal remedies, should be dismissed on grounds of judicial immunity (Pet. App. 11a-12a).

On a consolidated appeal, the Appellate Division, First Department affirmed the orders of both the Supreme Court and Court of Claims dismissing the petition and claim (Pet. App. 2a-3a). It found both that CPLR § 205(a) was not available to toll the statute of limitations in an action not timely commenced in the Court of Claims, and that, because DHCR's actions and the State's statutes advanced a legitimate state interest and did not deny petitioners economic use of their property, the takings and due process claims lacked merit (Pet. App. 2a-3a).

Petitioners' motions for leave to appeal to the Court of Appeals were denied by both the Appellate Division (Pet. App. 2a-3a) and the Court of Appeals (Pet. App. 1a).

ARGUMENT

Because petitioners' regulatory takings claim was dismissed in state court for failure to comply with the state statute of limitations, this Court should decline to grant certiorari to review that claim. *Herb v. Pitcairn*, 324 U.S. 117 (1945). In any event, the regulatory takings claim is meritless: petitioners have failed to make a colorable argument that they were denied all economically beneficial use of their property under the state regulatory requirement. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). Likewise, petitioners' claims that they were compelled to act as landlords for the lengthy period of litigation over their effort to evict their tenants, in violation of due process rights of liberty and occupational freedom (Pet. pp. 11-14) are meritless. Having purchased their property in a jurisdiction with many long-recognized state law remedies for the protection of tenants, petitioners can claim neither surprise nor unfairness in their tenants' tenacious efforts to avoid eviction or at the success that those efforts initially enjoyed. Moreover, inasmuch as that legal process yielded them the relief which they sought, this case poses no proper basis for petitioners' apparent challenge to the Twenty Year Law.

POINT I

INASMUCH AS THE DISMISSAL OF PETITIONERS' TAKINGS CLAIM WAS BASED UPON AN INTERPRETATION OF A STATE STATUTE OF LIMITATIONS AND DOES NOT RAISE A FEDERAL CONSTITUTIONAL ISSUE, THIS COURT SHOULD DENY CERTIORARI

For reasons of judicial economy and comity, this Court has long viewed cases in which a state court has ruled against a petitioner on an independent issue of state law as inferior vehicles for consideration of constitutional claims arising from the same proceeding. *Herb v. Pitcairn*, 324 U.S. at 125. In the instant matter, the Appellate Division confirmed the holding of the Court of Claims dismissing petitioners' regulatory takings claim as barred by the statute of limitations for failure to file properly in the Court of Claims (Pet. App. 5a). As that ruling was based on an independent state law ground, this Court should decline to grant certiorari to review the federal constitutional issues asserted by petitioners.

Petitioners' claim that this case established a novel rule of state law and presents an exception to the considerations set forth in *Herb v. Pitcairn* (Pet. p. 15) is meritless. As both the Court of Claims and the Appellate Division noted in the instant matter, the New York State Court of Appeals, in *Charbonneau v. State of New York*, 81 N.Y.2d 721, 593 N.Y.S.2d 758 (1992), set forth its intention to apply a strict and literal reading of the Court of Claims Act to bar untimely actions, thus allowing recommencement under CPLR § 205(a) only in actions that were timely commenced. While the precise issue addressed in the matter at bar had not been previously decided, it is hardly a novel application of that earlier principle. Simply stated,

petitioners have not supported and cannot support their claim that this ruling thwarted "justified reliance upon prior decisions" in the manner set forth by this Court in *NAACP v. Alabama*, 357 U.S. 449, 457 (1958) (Pet. p. 15). Consequently, the petition for certiorari should be denied.

POINT II

AS PETITIONERS HAVE SET FORTH NEITHER A VIABLE CLAIM OF A REGULATORY TAKING OF THEIR PROPERTY, NOR A PLAUSIBLE CLAIM THAT THEY WERE "COMPELLED" TO SERVE AS LANDLORDS, THIS COURT SHOULD DENY CERTIORARI

To the extent that the Appellate Division's ruling on alternative state law grounds does not preclude review of the issues raised in the petition for certiorari, this Court should nonetheless deny certiorari because petitioners have set forth no viable claim of a regulatory taking of their property, or denial of due process, or impressment into an occupation against their will.

It is well settled that a regulation which deprives an owner of the preferred or most beneficial use of her property does not render it unconstitutional. *See, e.g., Goldblatt v. Hempstead*, 369 U.S. 590, 592 (1962). As a general matter, land use regulation does not effect a taking when it "substantially advance[s] legitimate state interests [and does not] den[y] an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). Determination of whether a taking has occurred requires a more complex analysis, including examination of the economic impact of the regulation, the extent of its interference in reasonable investment-backed expectations, and the character of the government's action. *Penn Central Transportation Co. v New York City*, 438 U.S. 104, 124 (1978). A regulatory taking will be found where petitioners can demonstrate that they "ha[ve] been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave [their]...property economically idle." *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019.

As we have noted above, petitioners in the instant matter purchased a seven-unit property, occupied by several tenants, in New York City, a closely regulated housing market. They commenced, and ultimately prevailed in, a legal proceeding to evict those tenants. During the course of that legal proceeding, they were able to occupy the property -- although not to the full extent that they wished -- and to collect rents from units occupied by tenants. Under these circumstances, petitioners can make no showing that they were called upon to sacrifice all economically beneficial use of their property for the common good. *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1019.

Likewise, petitioners have raised no viable claim to lack of due process or compelled landlordship (Pet. pp. 11-14). Petitioners willingly entered the real estate marketplace, knowingly purchased occupied property, and voluntarily became New York City landlords. Though they undertook that role with an intent that it be short-lived, petitioners upon purchase of occupied property willingly assumed responsibility for the rights of their tenants, including the right to resist eviction pursuant to state and local law. Ironically, the due process claim against the respondents in this matter arises solely from their role as jural agents in the eviction litigation process -- that is, providers of due process to all parties. Petitioners have cited no authority for the novel proposition that such judicial or quasi-judicial acts of resolving landlord-tenant disputes may result in a due process claim against the arbiter.

Nor is there merit in petitioners' claim that the decision at issue is in conflict with constitutional authority of other states. Simply stated, neither *Polednak v. Rent Control Board of Cambridge,* 397 Mass. 854, 494 N.E.2d 1025 (1986) (retroactive application of statute requiring permit for removal of unit

from rental housing market would constitute a taking) nor *Kennedy v. City of Seattle*, 94 Wash. 2d 376, 617 P.2d 713 (1980) (ordinance imposing restrictions on houseboat evictions deemed confiscatory) addresses the salient issue of this matter: whether a temporary taking occurs during the litigation of a landlord-tenant dispute which ultimately results in the full relief sought by the landlord.

Finally, petitioners' challenge to the substantive elements of the Twenty Year Law (Pet. pp. 24-25) is simply beside the point. As the statute and ancillary regulations have been interpreted in a manner which permits petitioners the full eviction relief which they initially sought, this case poses no basis for review of the statute's provisions.

In sum, petitioner has provided no support for the proposition that provision of a legal mechanism by which a tenant may challenge an eviction denies landlords due process or constitutes improper impressment of a property owner into the occupation of landlord. The instant action, we submit, is an inappropriate vehicle for consideration of this proposition. Consequently, this Court should deny the petition for a writ of certiorari.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
January 16, 1998

Respectfully submitted,

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